FRANCHISE GRANTS IN NEW YORK CITY

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For the comprehension of the existing franchise situation in New York, a brief historical sketch of the evolution of the franchise-granting power is necessary.

The power to grant franchises is, of course, in the state, which has from time to time delegated its powers to the municipality, with restrictions as to the time for which franchises may be granted, and requiring the consent of local authorities, or abutting property owners. The Dutch states-general and the English crown vested the mayor and aldermen of the City of New York with broad powers as to franchises and, on the whole, these powers seem to have been carefully guarded in the earlier days. Among the earlier franchises were some for markets and wharves or docks. Markets were the earliest illustration of municipal ownership and operation, the city constructing the buildings and leasing stalls to merchants. Franchises for ferries between Manhattan Island and Nassau Island, and with the mainland (New Jersey) were also of early creation. In all cases the grant of the privilege involved the payment to the state of a special rent, or a proportion of the receipts. In most cases the period of the lease was short, so that the city derived a benefit from the growing value of the privileges conferred.

After the Revolution, the rapid growth of the city made special franchises of extraordinary value, and the power to grant them, possessed by the board of aldermen, seems to have been the chief factor in earning for the board the unenviable reputation which it has long borne. Indeed, the story of the granting of franchises from the earliest period down to the consolidation of the greater city is a most discouraging record. Except in the case of franchises for ferries and gas companies, no time limitation seems to have been imposed, although the franchises did contain a provision requiring efficient public service.

By the definition of the New York courts a franchise is declared to be a special privilege conferred by the government on

individuals and corporations. It is a privilege which does not belong to citizens of the country in general by common right. A distinction exists between a franchise to be a corporation and the other franchises which may be conferred by the sovereign power upon corporations. The right to be a corporation is itself a separate, distinct and independent franchise, and the corporation having been created may receive a grant of other distinct and independent franchises. These later franchises are no part of the essential franchise of a right to be a corporation, but are additional. Those franchises which permit corporations to perform certain public services are called public franchises. The importance of keeping this distinction in mind is well demonstrated by the case of the Broadway road.

On December 5, 1884, the board of aldermen of the City of New York passed a resolution granting a franchise for a surface railroad on Broadway to the Broadway Surface Railroad Company. As the result of a struggle for the control of this valuable franchise a legislative investigation into the manner and consideration for the granting of the franchise was instituted, which was followed by the indictment of a majority of the board of aldermen. The public indignation, following on disclosures of corruption, caused a law to be passed in May, 1886, dissolving the Broadway Surface Railroad Company. But while the franchise of the company to be a corporation was declared by the courts to be thereby extinguished, the franchise to own and operate the road had not been extinguished, and the latter franchise, together with all the property of the company, which had passed into the hands of a receiver, was disposed of at public auction and bought by the Broadway Railway Company, a former rival of the defunct Broadway Surface Railroad Company.

In this case it will be seen that the distinction between a franchise to be a company and a franchise, to own and operate a road was very sharply defined. The award of the Broadway franchise was the climax of a series of corrupt awards which had been going on for more than half a century. By the time consolidation arrived (January 1, 1897) practically every available surface franchise was controlled by one or other of the corporations doing business in New York, and while none of the franchises were in terms exclusive, the companies were generally able to suppress com-

petition by influence upon the bodies having the power to grant new franchises.

When the new charter of 1897 went into effect, it limited the power of the local authorities to grant franchises to a period not to exceed 25 years with 25 years renewal for surface roads, and 50 years with 25 years renewal for sub-surface roads—the increase in the term of franchise for the latter being due to the recognition of their greatly higher cost of construction. The result of this change of policy was to diminish the demand for new rights, and in the early years of the greater city few applications for franchises were made.

In 1905 a very radical change in the method of granting franchises took place. The power to grant franchises in the City of New York was taken from the board of aldermen and vested by act of the legislature in the board of estimate and apportionment, subject to the approval of the mayor. The board of estimate consists of the mayor, comptroller and president of the board of aldermen, each having three votes and elected by the voters of the whole city; the presidents of the boroughs of Manhattan and Brooklyn having two votes each; and the presidents of Bronx, Queens and Richmond, having one vote each, the latter officials being elected by the voters of the respective boroughs.

It is a notable occurrence that the action of the board, which caused its power to be finally taken from it, was not the improper granting of a franchise, but the withholding of a franchise. The Pennsylvania Company, being desirous of connecting its Jersey lines with its recently-acquired Long Island lines, asked for a perpetual franchise with twenty-five year revaluations, for a tunnel under the Hudson River, under certain streets of the Borough of Manhattan, under the East River and finally to Jamaica, L. I. The rapid transit commission, which had jurisdiction of sub-surface roads, granted its consent, but was compelled, under the law, to refer the matter to the board of aldermen. The board of aldermen referred the matter to a committee which took no action for several months. Finally the counsel for the Pennsylvania Company, the Hon. Edward M. Shepard, had a bill drawn amending the charter so as to transfer the power to grant consent in such cases from the board of aldermen to the board of estimate and apportionment. The bill passed the legislature, and thus the board of aldermen of the city

was shorn of the only important function then remaining in its hands.

Public sentiment in Manhattan especially, and in a general way through all sections of the city, is opposed to further extensions of elevated railroads as being unsightly, unsanitary and prejudical to the living conditions of people in their immediate vicinity. Hence most of the discussions in New York to-day centers about the granting of franchises for subways.

Subway construction is so comparatively novel in the experience for American municipalities, that the people have not yet begun to adjust themselves to the new conditions which are thus created. Subway construction and equipment is estimated to cost about $3,000,000 per mile, and it is obvious that no short-term franchise, with a five-cent fare, can be so drawn as to be an attractive proposition for private capital. This fact has not been made very clear to the public, which grows more and more impatient of published propositions to amend the Elsberg Bill, which became a law three years ago and which rendered impossible the granting of franchises for fifty years with a renewal of twenty-five years, as in the case of the present subway.

The most important step which has been taken towards reform in the granting of franchises has been the creation of a bureau in the office of the comptroller known as the bureau of franchises whose functions are as follows:

First, to report upon all current applications for franchises, or, in other words, to make an inquiry required by law.

Second, supply information to the legal departments of the city, also to administrative officers who are charged with issuing permits for the use and opening of streets to enable the companies to operate under their respective grants.

Third, to watch the operations of the several companies under their franchises, in order that the rights granted may not be abused or exceeded, and that their several obligations be promptly met.

The value of this agency can hardly be overestimated. Up to the time of its creation there was practically no place to which an official, desirous of doing justice to the city, could go for information as to the terms of grants existing or applied for. The bureau has in its three years of existence collated what is probably the most complete collection of facts dealing with fran-

chise questions ever gathered in one place. When it is considered that its work involved the search of the minutes and records of all the local boards of the various cities, towns and villages, etc., that were absorbed into Greater New York, and that these bodies had existed for periods varying from two hundred years to twenty years, the colossal task involved can be estimated. This bureau has been recently made independent of the comptroller's office and been placed directly under the control of the Board of Estimate and Apportionment.

A very large number of franchises were procured by persons who had neither the means nor the desire to operate under them, simply for the purpose of holding them in case at some future time the privilege would have value. There is a case on record of a franchise to construct a bridge across the East River having been awarded to a company by the legislature. No limitation of time was imposed and no steps ever taken to construct the bridge under the franchise. Nevertheless, when the City of New York decided to construct a bridge at or near the same point for which this franchise had been secured, the city was compelled to pay a considerable sum to the owners of the franchise in order to compensate them for the property right which their franchise gave them, and for which they had made absolutely no return to the state.

While it may be truly stated that it is a case of locking the stable door after the steed is stolen, the system under which public franchises can now be obtained in New York to-day fairly safeguards the public interests, providing the officials are honest and energetic. In the first place all the proceedings of the board which grants them must be public. All publications, when made, must be duly advertised in the City *Record,* which is the official publication of the city, and twice in two daily newspapers. A public hearing must be given at which objectors have a right to be heard. Subsequently the board must appoint a committee to inquire into the money value of the rights sought, and finally, when the terms of the contract have been agreed upon they must be published and a final public hearing given. Franchises must receive a vote of three-fourths of the board before becoming operative, and finally, they must have the approval of the mayor. In former times if the mayor vetoed a franchise the board of aldermen could pass it over his veto, and such action was frequently taken. As matters now stand the full responsi-

bility for any franchise grant rests upon the mayor, because his refusal to approve kills the whole matter; thus is the power and responsibility centralized. It was inevitable that this systematization of franchise grants and the insistence upon fair terms for the city should much reduce the number of applications, and hence, as the development of the city requires a constant increase in its public service, public opinion has been progressing along new lines.

For a long time the impression has prevailed that the city should grant no further public franchises. The Citizens Union, which represents the conservative progressive sentiment in New York, incorporated in its platform, in 1901, the demand that the city grant no further public franchises, and resume those with which it had alienated, as rapidly as its financial condition would permit. In accordance with this declaration the Staten Island Ferry was municipalized, although the original plan did not involve municipal operation, it being the intention of Mayor Low and his advisers that the city should own the piers and boats and lease the operation for short periods, which seemed to be entirely feasible, the new administration, being of a different political complexion, concluded to take a step further and decided that the city should undertake operation.

The result of the action taken has been, on the whole, favorable to the contention of the advocates of municipalization, for while the ferry has, for reasons unconnected with its administration, been a charge upon the city, it has so largely improved values in the districts served as to recoup the city for the expense of its maintenance. Other franchises for ferries are being resumed by the city chiefly because, on account of the competition of bridges and tunnels their patronage has fallen to a point where they are no longer profitable. The result of all these tendencies has been to create a demand for the construction of the permanent features of public utilities by the city; the retention of their ownership in the city's hands, and the substitution for the former franchises which have created vested interests in the city's streets, of operating leases for short periods subject to revocation for failure of efficient service and resumption by the city on fair terms of compensation whenever the city shall so elect.

A principle, favoring this tendency, which has been seen only recently, is that all such improvements tend to increase the value of the land adjacent, and it has been pointed out that, if the widening

of a highway, or the change in pavement from macadam to asphalt is a proper subject for assessment upon the benefited area there is no reason why the cost of such improvements as railroads, excluding equipment, of course, instead of being borne by the passengers, should not be collected from the owners of the property benefited. Indeed, a little consideration shows that especially in the construction of elevated or subway roads there are two distinct elements. First, the creation of an additional highway; and second, the transportation along that highway when completed. The second of these charges is the only one which should be borne by the passengers, as the first charge has already created values sufficient to pay for construction. The advocacy of such a principle would furnish an obvious check to reckless municipal construction of railroads, because they could only be run through districts which were sufficiently developed to pay for them. We may be approaching a period when the granting of franchises will be superseded by the granting of operating leases which will not have the character of irrevocable contracts which many of the present franchises possess.

If, however, the system of franchise grants is to continue, the most thorough and enlightened investigation of all applications should be insisted upon. It should always be kept in mind that there is but one side to a franchise: if the city makes a bad bargain the courts will hold it, but if the company makes an unprofitable bargain it can always go into the hands of a receiver to be relieved from its obligations. The fact that the streets of a city are real estate of great value, and that grants of rights in them, however, urged upon grounds of public convenience, are really conversions of public property to private uses is becoming more obvious to the people daily. Such wholesale confiscation of public property without adequate consideration, as disgraced the latter half of the last century, seems to be no longer possible, but there is always the danger that private interests may outwit the keenness of public servants, and therefore every franchise, however granted, should provide a clause permitting its own revocation upon terms fair to the grantor and grantee.